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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED FRUIT COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE AND A PETITON FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner-plaintiff International Railways of Central America ("IRCA") so moves on the following grounds:

1. Overwhelming evidence proving what defendant conceded, disproving what the Court found and, at least, raising a triable issue in an antitrust action, now being offered because the Court of Appeals surprised petitioner-plaintiff by a decision on an issue first raised in its opinion, upon which petitioner-plaintiff had no opportunity to introduce evidence in opposition to defendant's motion for summary judgment (manifest injustice and substantial grounds available to petitioner although not previously presented).

2. Subsequent decision of the Court of Appeals for the Second Circuit in the same term directly inconsistent with the decision in our case demonstrating the error committed in drawing inferences in favor of the party *moving* for summary judgment and placing the burden of proof on the party *opposing* the motion (intervening circumstances of substantial or controlling effect and manifest injustice).

Dated: December 14, 1967.

Respectfully submitted,

M. Victor Leventritt,
Attorney for Petitioner.

PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement and Opinions Below

This is petitioner-plaintiff International Railways of Central America's ("IRCA"), first petition for rehearing filed in this Court; it is submitted in good faith and not for reasons of delay.

The United States District Court for the Southern District of New York granted respondent-defendant United Fruit Company's ("United") motion for summary judgment on the grounds of *res judicata* and statute of limitations on antitrust violations (254 F. Supp. 233); it is printed in petitioner's Appendix I, 5a-21a.

On January 27, 1967 the Court of Appeals for the Second Circuit (373 F. 2d 408) (Appendix A hereto) affirmed the summary judgment on statute of limitations on a fact issue *newly created by it,* to wit, that plaintiff had failed to sustain its burden of proof:

> "that a demand on the IRCA directors for the institution of a treble damage action between May, 1959 and February, 1961 . . . would necessarily have been fruitless." (App. 15a).*

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* The Court of Appeals reversed the ground of *res judicata* and *refused to answer* the "more difficult question" of law on statute of limitations decided in the district court and presented to the Court of Appeals:

> "whether or under what circumstances the *mere possibility* of [an antitrust] suit by an informed stockholder or director would end tolling due to 'domination' of a corporation [IRCA] by the alleged wrongdoer" [United Fruit] (App. 16a).

The Court of Appeals erred:

1. (a) in deciding defendant's motion for summary judgment upon a fact issue that had never been presented to the district court or Court of Appeals,

   (b) without giving plaintiff an opportunity to introduce evidence on that new fact issue,

   (c) by making said fact finding in favor of the defendant even though it was squarely inconsistent with defendant's own concession; defendant *had conceded,* for purposes of its motion, that its domination of plaintiff in the relevant period would have been sufficient "to prevent Railways from bringing an action [against defendant] *in its own name*" (App. 32a) and that a demand on the plaintiff's directors to sue defendant would have been a "useless and futile act." (App. 32a) The Court of Appeals directly contrary to that concession found that plaintiff had failed to show "that a demand . . . would necessarily have been fruitless" (App. 15a), and

2. by drawing inferences in *favor* of the party *moving* for summary judgment in flagrant violation of the established law, and by placing the burden of proof on the party *opposing* the motion.

Plaintiff filed a petition for a writ of certiorari and defendant filed a conditional Cross-Petition. On May 22, 1967, this Court denied both petitions (18 L. Ed. 2d 975). On October 25, 1967, plaintiff filed a motion for leave to file a petition for rehearing in the Court of Appeals; on November 3, 1967, that motion was denied, without opinion.

Reasons for Motion and Petition

1. Plaintiff summarizes below overwhelming evidence it has never been afforded an opportunity to tender to the district court and the Court of Appeals because the Court of Appeals surprised plaintiff and granted summary judgment on the fact issue of "lack of demand" and "domination" without plaintiff knowing it was ever in issue. As this Court so appropriately stated in *Hormel* v. *Helvering*, 312 U. S. 552, 556:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplated that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; *it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.*"

That error by the Court of Appeals was compounded in that it was not reviewing a complete trial record but an abbreviated record on a motion for summary judgment not intended to cover said fact issues.

Plaintiff's overwhelming evidence* would prove what United had conceded and disprove what the Court found and, at least, raise a triable issue:

> (a) In 1958, after the Referee's decision in the State Court derivative action in *Ripley*, stockholders of plaintiff made a demand on a director and IRCA's counsel that pursuant to the final judgment in the

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* Plaintiff's overwhelming evidence it never had an opportunity to offer is contained in Appendix B, pp. 24a-31a.

government's antitrust suit against United, IRCA collect from United the same rates that were paid by others. That demand was refused (App., pp. 24a-25a).

(b) Contra the Court of Appeals, the principal reason the directors of IRCA supported plaintiffs-stockholders' request for higher damages on the State Court appeals in *Ripley* is that they had *"no option"*, otherwise they would "lay [them]selves open to attack for personal liability" (App., p. 26a).

(c) After the Referee's decision in *Ripley* holding that there was complete domination of IRCA's directors by United, certain IRCA directors, in late 1958 and early 1959, made repeated attempts to have United carry out their "concrete suggestions" to cure the *unsatisfactory management relationship* between IRCA and United; United failed to respond; then six out of the eleven IRCA directors, instead of fighting United, took the easy out and resigned or refused to stand for reelection in 1959. United's domination of IRCA thereafter became even more direct and open with Mr. James McGovern, *United's* General Attorney, taking the office of Chairman of the IRCA board (App., pp. 26a-28a).

(d) After Mr. McGovern became IRCA's Board Chairman in 1959, Sullivan & Cromwell resigned as IRCA's general counsel; that resignation was accepted as to all matters but the *Ripley* case in the State Court; Mr. McGovern directed that "Sullivan & Cromwell not be consulted as counsel"; and all legal matters not dealing with the State Court suit were directly controlled by Mr. McGovern (App., p. 24a).

(e) In both 1958 and 1959, independents attempted to take control of IRCA and lost (App., pp. 28a-30a).

(f) At least after 1958, IRCA was not making any money on United's bananas shipped from the west

coast of Guatemala and did nothing about it. IRCA actually turned away profitable business to accept United's business at a loss. No independent management would have permitted such a situation to continue, especially where that unprofitable traffic was the single largest segment of its business (App., pp. 30a-31a).

2. On defendant's motion for summary judgment, the Court of Appeals erroneously placed the burden on plaintiff to "effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." Plaintiff was therefore erroneously required to prove the negative on defendant's motion for summary judgment without knowing the fact was in issue, since it was already conceded by defendant.

The Court of Appeals made inferences of fact in favor of the *moving* party, *contrary* to well-settled law, *U. S.* v. *Diebold,* 369 U. S. 654 and *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464. Subsequent to the decision here by the Court of Appeals on January 27, 1967, that same court on July 13, 1967 in *Shinabarger* v. *United Aircraft, et al.,* 381 F. 2d 808, 810 (C A 2), applied the established law on summary judgment on the issue of tolling the statute of limitations, to wit, if one inference "viewed in the light most favorable to the party *opposing* the motion, supports his position, summary judgment is not proper", citing *Diebold, supra.* That left the decision on summary judgment in the present case standing alone.

Evenhandedness in the administration of justice requires that the "rules of the game" be applied uniformly for all litigants and not be changed in the middle of the case, as was done here. The result here is that plaintiff has been effectively denied its day in court on antitrust claims through 1961 under the erroneous application of summary judgment rules. This Court held it was error where the

Court of Appeals:

> "'*made an inference of fact directly in conflict with the stipulation of the parties* and the findings, for which we think the record affords no support whatever.'" (emphasis added) *Hormel* v. *Helvering, supra,* 558, quoting from *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206, 207.

Likewise here, the Court of Appeals "made an inference of fact directly in conflict with the [concession of United]", which was tantamount to a "stipulation of the parties" for purposes of United's motion.

In *Poller, supra,* this Court held (468):

> ". . . This rule [56(c)] authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, *where it is quite clear what the truth is,* . . .' [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial . . . if they really have issues to try.'" (emphasis supplied)

In *Hormel, supra,* this Court stated (557):

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them."

Plaintiff has been misled to its prejudice. The Court of Appeals in its opinion recognized the fact that plaintiff might have been entitled to take evidence on the issue of "futility" and "domination" but stated that plaintiff had:

> "raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point." (App. 15a, fn. 10)

Plaintiff made no objection nor did it advert to further evidence because a law issue was to be decided upon conceded facts. When the Court of Appeals rejected the conceded facts, plaintiff should have been afforded an opportunity to offer evidence on the new fact issue first created by the Court of Appeals. There lies further error and manifest unfairness to petitioner.

The motion for leave to file and a petition for rehearing under Rule 58(2) of the Supreme Court Rules are grounded upon "substantial grounds available to petitioner although not previously presented" (the overwhelming evidence) and "intervening circumstances of substantial or controlling effect" (the decision in *Shinabarger* in July, 1967) "justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules' ". *Gondeck* v. *Pan Am World Airways, supra,* 26; *United States* v. *Ohio Power Co., supra,* 99. Another ground is *"manifest injustice", Cahill* v. *New York, N. H. & H. R. Co.* (dissent), 351 U. S. 183, 188.

Plaintiff submits that the effective denial of due process of law, to wit, not to have its day in court and offer evidence is a "manifest injustice" that far outweighs considerations of finality of a judgment.

Plaintiff seeks its day in court, to wit, a trial initially on whether United dominated IRCA so that it prevented IRCA from suing United for antitrust wrongs committed by United.

Conclusion

The motion for leave to file the petition for rehearing should be granted; the petition for rehearing should be granted and the order denying certiorari vacated; the petition for certiorari should be granted; the judgment of the Court of Appeals should be reversed and this matter remanded to the district court for a trial.

December 14, 1967.

Respectfully submitted,

M. Victor Leventritt,
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Of Counsel:

Aaron Lewittes,
Sidney Bender,
Abraham K. Weber.

Certificate of Counsel.

The undersigned, attorney for petitioner-plaintiff International Railways of Central America, hereby certifies that the foregoing motion for leave to file a petition for rehearing and the petition for rehearing are presented in good faith and not for delay.

M. VICTOR LEVENTRITT

APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 178—September Term, 1966.

(Argued November 29, 1966 Decided January 27, 1967.)

Docket No. 30638

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and SMITH, *Circuit Judges.*

Appeal by plaintiff, in an action in the District Court for the Southern District of New York for treble damages under the antitrust laws and other relief, from an order, Sylvester J. Ryan, *Judge,* 254 F. Supp. 233, granting a motion for partial summary judgment by defendant and denying such a motion by plaintiff. Order granting defendant's motion affirmed in part and reversed in part; order denying plaintiff's motion affirmed.

Opinion of Court of Appeals.

AARON LEWITTES (Leventritt, Bush, Lewittes & Bender, New York, N. Y.) (M. Victor Leventritt, Sidney Bender, Abraham K. Weber, of Counsel), *for Plaintiff-Appellant.*

RALPH M. CARSON (Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y.) (Porter R. Chandler, Robert F. Dobbin, of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge:*

This action was brought on February 16, 1965, by International Railways of Central America (IRCA) against United Fruit Company (UF) in the District Court for the Southern District of New York. The complaint, analyzed in more detail below, asserted six claims, the first four and the sixth seeking treble damages for breach of the antitrust laws, 15 U. S. C. § 15, and the fifth, predicated on the same facts as the third, primarily seeking damages for breach of contract. The asserted damages, going back in some instances to 1928, when trebled were in excess of a half billion dollars.

UF moved for summary judgment (1) dismissing the first, second, fourth and sixth claims and so much of the third and fifth as related to matters occurring before 1961, on the ground that their prosecution was barred by the final judgment awarding damages through December 31, 1960, in a derivative action brought in the New York courts by stockholders of IRCA (hereafter "the *Ripley* action") against that company as a nominal and UF as the real defendant; and (2) dismissing so much of the claims (other than the fifth insofar as it was based on alleged breach of contract) as related to matters occurring before February 16, 1961, as barred by the four-year statute of

limitations for antitrust actions, 15 U. S. C. § 15b. Plaintiff countered with a motion for partial summary judgment as to UF's liability on the first, second, fourth and sixth claims and also as to damages on the second and sixth, mainly on the basis of the record and judgment in the *Ripley* action. Judge Ryan granted both branches of UF's motion and denied plaintiff's, 254 F. Supp. 233 (1966). A judgment was entered which made the recitals appropriate under Rule 54 with respect to the grant of defendant's motion and contained certification under 28 U. S. C. § 1292(b); we granted leave to appeal so that the entire matter might be before us.

I.

A statement, necessarily condensed, of the relations of the parties and of previous litigation is essential to understanding. For the former we draw largely on the findings made by the referee in the *Ripley* action in 1957, which were affirmed by the hierarchy of New York courts.

IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.

In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which

UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock ownership was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S. A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as "special advisor" to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a

profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independente services comparable to those furnished its controlling stockholder.

In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. *Ripley* v. *International Railways of Central America*, 276 App. Div. 1006, 95 N.Y.S. 2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.[1] Although at the trial IRCA had opposed the

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[1] For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retro-

(Footnote continued on following page)

plaintiffs and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, *Ripley* v. *International Railways of Central America*, 8 A. D. 2d 310, 188 N.Y.S. 2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N. Y. 2d 430, 209 N.Y.S. 2d 289 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956-60 in the sum of $3,309,670.39, with interest.

In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree,

(Footnote continued from preceding page)

actively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15⅓ cent per stem rate which had applied from 1920 to 1930 should be restored from 1943 through 1955. For import traffic he directed an increase of 10% per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that "equity and fair dealing indicate, and no doubt will require, similar annual rateable increases" for the cross-country traffic "until the rates equal those fixed for the general public (or so-called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $4,531,055.38, including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate and would no longer ship bananas from western Guatemala over IRCA, as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965.

We conclude this history with a summary statement of the six claims in the complaint:

First: loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other bananna shippers from using IRCA, 1928-61, $75,000,000.

Second: utilizing IRCA to facilitate UF's monopolistic designs by granting it discriminatorily low rates, 1928-61, $55,000,000 less the principal paid on the state court judgment.

Third: restricting UF's own banana shipments over IRCA, 1949-64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000.

Fourth: monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from west coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher

rail revenues it could have obtained if there had been effective steamship competition, 1928-61, $15,000.000.

Fifth: breach of contract to ship west coast bananas (damages included in third claim).

Sixth: acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U. S. C. § 18 (damages equal to aggregate alleged in first four claims).

The total damages asserted, which may well contain some duplications, amounted to $169,000,000 and, when trebled to $507,000,000.

II.

We consider first the defense of the four-year statute of limitations for antitrust actions, 15 U. S. C. § 15b, which Judge Ryan sustained save as to the claim for breach of contract. IRCA asserts that the statute did not start to run on any of the antitrust claims until UF relinquished its domination in January, 1962, even though most of the facts had been spread on public records long before, and that the action, brought in February, 1965, was thus timely. UF responds that "domination" as a basis for tolling the statute with respect to an antitrust claim ceases to apply to a corporation once the facts giving rise to the action have become known to independent directors or stockholders since they can bring a derivative action for treble damages on the corporation's behalf, as held in *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2 Cir. 1953). It contends that this condition was here met as to stockholders not later than the annual meeting in March, 1952, when, after a thorough and heated airing of many

of the claims being advanced in *Ripley*, an opposition slate received some 204,000 votes as against 308,000 for the management, and as to directors in 1959 when three "independent" directors were elected to the IRCA board.* Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the *Ripley* action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury.

The closest that the Supreme Court has come to dealing with this vexing problem is *Curtis* v. *Connly*, 257 U. S. 260 (1921). This was a suit in equity by the receiver of a national bank against former directors for losses sustained by the payment of dividends out of capital and by improper loans and investments. The suit was brought August 2, 1916, and the six defendants whose liability was at issue had resigned by early 1910. Mr. Justice Holmes considered the suit to have been brought "upon the common-law right of the bank to recover for acts that diminished its assets,"

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*The three, Cunningham, Ruckle and Yaeger, were elected May 27, 1959, and remained as directors until 1963. Ruckle, a New Jeresy automobile dealer who had owned a substantial amount of IRCA stock since 1954, was invited by McGovern of UF to have his name on the management slate for 1959; so apparently was Cunningham. The record does not show the circumstances as to the nomination and election of Yaeger who had been on the opposition slate at the stockholders' meeting of 1952; however, in view of the absence of cumulative voting, it is inferable that he too was on the "management" slate even though known to be hostile to UF.

257 U. S. at 262,[3] and accordingly treated the case as governed wholly by the Rhode Island statute of limitations without considering possibly more extensive federal principles. The applicable Rhode Island statute was for six years with a proviso that "if any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence." The somewhat anthropomorphic view that "The bank, of course, must be charged with knowledge of what appeared upon its books," 257 U. S. at 262-63, disposed of the claims of concealment of illegal investments and, apparently, also of illegal dividends. The only point further discussed was the carrying of loans on the books at inflated values, as to which the "bank" itself would not perceive the error since the entries tallied with the amount of the loans and the concealment was simply the weakness of the borrower's credit. As to this, notice was found in the election of three new directors between 1909 and early 1910 who came to the board, admittedly with knowledge of the facts, "as the eyes of the bank." 257 U. S. at 264. The Supreme Court's opinion did not discuss, although those in the lower courts had, "the contention made, not with much apparent confidence, that the statute did not begin to run in favor of the retiring directors until the bank passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members . . . ." *Curtis* v. *Connly*, 264 Fed. 650, 652-53

[3] We are not clear why this was so, since the bill apparently alleged acts constituting federal claims under Rev. Stat. § 5239, see the decision of the District Court, *Curtis* v. *Metcalf*, 259 Fed. 961, 963-64 (D.R.I. 1919), and *Chesbrough* v. *Woolworth*, 244 U. S. 72, 78-79 (1917), but we take the opinion as we find it.

(1 Cir. 1920); see also *Curtis* v. *Metcalf*, 259 Fed. 961, 964-66 (D. R. I. 1919). Examination of the briefs in the Supreme Court discloses that the appellant's argument on this score went not to domination as such but rather to knowledge. "Three-fifteenths of a board of directors," it was urged, "is not enough to make their knowledge tantamount to knowledge by the bank." Although the domination issue thus was raised by the facts, the Supreme Court seems not truly to have focused upon it; and while the decision must be taken into account, we do not consider it nearly so conclusive in defendant's favor as did the district judge.

The three precedents in this Court that have been cited to us[4] do not assist decision much further. In *Michelsen* v. *Penney*, 135 F. 2d 409, 415 (2 Cir. 1943), an action by depositors and a receiver of a national bank against directors, we said that "the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers," and found that to be true until the receiver's appointment. But the directors other than Penney were "legally unqualified dummy directors," see 41 F. Supp. 603, 610 (S.D.N.Y. 1941), and it was for that reason that the court, shifting at this point to a theory of concealment, concluded that "notice should not be imputed to the bank, because all these new directors were elected by the controlling Penney group, many of them were lent qualifying shares by this group, and none of them were independent

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[4] We regard *Laird* v. *United Shipyards, Inc.*, 163 F. 2d 12, 15-16 (2 Cir.), cert. denied, 332 U. S. 842 (1947), as without relevance both because of the finding that at the time of the alleged breach of duty "all parties then having any interest in the corporation were fully aware of all the facts," and because the language "Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the group," clearly referred to the New York, not the federal, rule.

in any real sense." 135 F. 2d at 416, n. 2. In *Austrian* v. *Williams*, 103 F. Supp. 64 (S. D. N. Y. 1952), an action by the reorganization trustee of Central States Electric Corporation against directors and others, Judge Weinfeld found that Williams' domination of Central States, as to which see his review of the facts, 103 F. Supp. at 71-75, "was so pervasive that it effectively prevented the proper institution of actions against him and the directors liable with him." *Id.* at 115. Since this sentence was followed by the statement, "The nature and extent of the domination was such as effectively to conceal by its very existence the significant facts of the transactions under attack," it is not clear whether Williams' domination alone would have been considered enough under the circumstances, and this court's view as to the inapplicability of federal principles made it unnecessary to resolve that issue here. *Austrian* v. *Williams*, 198 F. 2d 697, 700-02 (2 Cir.), cert. denied, 344 U. S. 909 (1952).[5] In *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (2 Cir.), cert. denied, 368 U. S. 821 (1961), we again recognized "adverse domination" of a corporation as a basis for tolling the statute with respect to a federal claim, and characterized it as "an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress." However, we were not required to mark out the boundaries of the doctrine since we found the complaint "falls far short of" alleging control by the wrongdoers.

While the parties have cited many other federal decisions going in various directions, we see little to be gained

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[5] The opinion distinguished *Michelsen* v. *Penney*, *supra*, as expounding a "federal doctrine," 198 F. 2d at 700, applicable to an action to enforce the liability of a national bank director, compare fn. 3, although the *Michelsen* opinion was by no means clear on that point, see 135 F. 2d at 415, 416, n. 2.

by detailed analysis of them.[6] Many did not have to, or at any rate did not, distinguish between domination *qua* domination, i.e., as affecting the ability to sue, and domination as effecting concealment. None involved control by a single owner, as distinguished from a majority of more or less guilty directors some of whom might decide that their liability in a suit brought by the corporation would be less than their liability for not bringing one. Almost all were actions in behalf of depositors in insolvent national banks. In some ways that point operates in favor of tolling since it seems hard to charge such creditors with the failures of knowledgeable stockholders or the delinquencies of knowledgeable and independent directors; in other ways it operates against it, because in many cases the facts were known by National Bank Examiners, "the real 'eyes of the bank' " and the Comptroller of the Currency could "compel restitution, resignation, or a receivership." *Hughes* v. *Reed*, 46 F. 2d 435, 442 (10 Cir. 1931).

One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *Payne* v. *Ostrus*, 50 F. 2d 1039, 1042 (8 Cir. 1931). Such control was found, for example, in *Adams* v. *Clarke*, 22 F. 2d 957 (9 Cir. 1927), where all the directors were accused of wrongdoing and held a majority of the capital stock, and also in our *Michelsen* case, *supra*. This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder

[6] A goodly number are cited in an elaborate footnote to the opinion in *Michelsen*, 135 F. 2d at 416, n. 2. However, Judge Clark's law clerk failed him in one respect; the cases, other than *Curtis* v. *Connly*, cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.

or director could have induced the corporation to sue. And here we think IRCA fails.

While the odds may have been against the likelihood that IRCA's board of directors would have authorized an antitrust action against UF between May 1959 and February 1961, the possibility can by no means be dismissed as negligible. By that time, only four of the old-time directors remained. One of the replacements, Yaeger, would have been highly responsive to a stockholder's demand, see note 2, *supra*, and this also seems likely as to two others, Ruckle and Cunningham.[7] Nor can we simply assume that the other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA directors with whom he was concerned,[8] the very vigor of that then recent expression, its affirmance by the New York courts, the 1958 decree of divestiture in the Government's antitrust suit, and the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request. See Baker & Cary, Corporations, Cases and Materials 470-71 (1959); cf. *Wolf* v. *Barkes*, 348 F. 2d

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[7] Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961, in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation.

other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA directors with whom he was concerned,[8] the very vigor of that then re-

[8] "It is difficult to consider with patience the lack of information, inquisitiveness, of prudent care, and of concern of these directors and principal managers of IRCA as testified to by themselves in respect of the very important items of rates and contracts and dealings between their own company, IRCA, and its principal customer-shipper, U. F. Co. These men, it is found, were otherwise as U. F. Co. states it 'upright and honorable men' of high standing and unblemished reputation. * * *"

994, 996 (2 Cir.), cert. denied, 382 U. S. 941 (1965). In this connection, we find considerable significance in the changed position taken by IRCA in the *Ripley* action where in 1958, after the Referee's decision, it urged that the judgment "should be supported and increased," to reflect the full difference between the rates to UF and to independents. While this could be dismissed as cheap insurance for the directors with no real harm to UF since IRCA was merely supporting a position the plaintiff-stockholders were taking anyway, it is equally reasonable to regard it as meaning that the directors, even before the election of the three independents, had come to recogize their duty to protect the corporation once the spectre of loss of the UF contracts had been dissipated. Taking everything into account,[9] we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May, 1959 and February, 1961 by a stockholder or director would necessarily have been fruitless.[10] UF's control of IRCA thus was no longer "full, complete and exclusive" in the

[9] The directors also could not have overlooked the risk of dislodgment despite UF's large stock interest. In the 1952 election, five years before the Referee's findings in *Ripley*, the management slate received the votes of only some 51,000 shares other than the 256,000 owned by UF, the independents got some 204,000, and about 89,000 shares, or nearly 15% did not vote. In an election that would have been featured by cries as to the majority's refusal to authorize a multi-million dollar suit against UF arguably called for by the *Ripley* findings and with no risks save the expense of litigation, a considerably larger total vote and an even greater proportion against the UF slate would have been likely. With 95% of the stock voting, UF would have had to retain the suffrage of 29,000 of the independent shares to prevail. Even assembling a respectable management slate would not have been easy under the circumstances.

[10] While this issue is one on which plaintiff might have been entitled to take evidence, it raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point.

sense here relevant.[11] We thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to "domination" of a corporation by the alleged wrongdoer.

In upholding the partial defense of limitations in this case, we are thoroughly mindful that "the treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute," *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9 Cir. 1955), and "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore

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[11] IRCA cites *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R.*, 213 U. S. 435 (1909), which held that shareholders could bring a derivative suit without making the prior demands on management and the shareholders then required by Equity Rule 94 where a majority of the corporation's directors were officers or directors of the corporation alleged to have inflicted the injury and the latter owned 22.9% of the injured corporation's stock. It argues that the question in that case was whether the plaintiffs could reasonably assume that management itself would not bring a suit in the corporation's interests when a majority of the board of directors was controlled by the prospective defendant; that the Supreme Court held in the affirmative; and that the question in this case is the same. Quite apart from the important distinction that only one of IRCA's directors in 1959 was an officer or director of UF, the problems are dissimilar. The basis for barring a derivative suit without prior demand is simply the lack of reason for such an action if the corporation is willing to sue itself, a principle adopted for the benefit of the very corporation that will profit from successful prosecution of the suit. We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception. Although the question asked in the two situations thus may be formally the same, a plaintiff must go further in negating the possibility of suit by the corporation in the situation here *sub judice* since tolling the statute of limitations is far stronger medicine than dispensing with a demand as a condition to the bringing of a derivative action and will impinge upon different interests.

make them more effective." *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 893 (5 Cir. 1954), cert. denied, 348 U. S. 912 (1955). See *United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill.[12] Moreover, the statute of limitations itself embodies a strong policy "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-49 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF.[13]

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[12] Indeed, disregard of the statute of limitations might impede efforts by the Government to obtain divestitures by consent. If UF had retained its stock ownership in IRCA, it would have shared *pro tanto* in any recovery from itself; a controlling stockholder may well be reluctant to sell, at a price reflecting only usual business considerations, if the corporation under new ownership can recover treble damages reaching over decades. And there is surely some anomaly in a doctrine whereby, although there could be no recovery against a former 100% stockholder, and a present 90% stockholder would suffer to the extent of only 10% of the amount recovered in a derivative action, 100% damages without limit of time could be obtained after a 90% stock interest was divested at a price in no way reflecting the claim.

[13] Recovery of the damages sought, without taking account of income taxes, would amount to some $845 for each share of IRCA, and to some $62 per share of UF, currently selling around $31.

(Footnote continued on following page)

Since IRCA has not met its burden of demonstrating that, after the election of the three independent directors in 1959, UF had such "full, complete and exclusive control" as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or director, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the antitrust laws arising prior to February 16, 1961, were barred by limitations.

III.

Our holding on the statute of limitations reduces the importance of the branch of UF's motion based on the rule against splitting a cause of action almost but not entirely to the vanishing point. With all claims prior to February 16, 1961, save so much of the fifth as concerns breach of contract,[14] barred by the four-year statute, the only remaining ones that would be excluded by the splitting rule are the antitrust claims relating to the period between that date and the dissipation of the effects of UF's control consequent on the sale of its stock in Janu-

(Footnote continued from preceding page)

While the *ad damnum* may be on the optomistic side and income taxes and deductions would cut the amounts roughly in half, the figures remain huge. Yet 68% of the common stock of IRCA is owned by a recent purchaser, and some notion as to how few of the minority stockholders date back to an early period is conveyed by the fact that of the 26 plaintiffs in the *Ripley* action, brought in 1949, only two had acquired their stock before 1945.

[14] Although the District Court's judgment dismissed so much of the third and fifth claims as related to matters occurring before February 16, 1961, "on the ground of *res judicata*," this direction as to the fifth does not accord with the language or theory of the opinion, see 254 F. Supp. at 239.

ary 1962. Moreover, the second claim may have scant practical application to that relatively recent period in view of the provisions for rate increases in the *Ripley* judgment.

Starting from the doctrine that a plaintiff must recover all damages arising from given operative facts in a single action, Restatement, Judgments, § 62, defendant contends that the facts relied on by IRCA for recovery under the antitrust laws in this action are the same as those sued on by its stockholders in *Ripley*. Plaintiff disputes this; it claims that the rule against splitting is inapplicable when the first suit was brought in a forum which lacked power to give the relief sought in the second, thereby distinguishing such cases as *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d 464 (3 Cir. 1950), cert. denied, 341 U. S. 921 (1951), *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F. 2d 362 (5 Cir. 1961), and *Engelhardt* v. *Bell & Howell Co.*, 327 F. 2d 30 (8 Cir. 1964); and it argues that in no event should the rule be applied when a forum without power to give full relief was chosen not by the corporation now plaintiff but by stockholders forced to act in its behalf because of an unwillingness to sue dictated by the defendant, especially when they were ignorant of antitrust violations when the suit was brought.[15]

On the point of fact raised by the argument, the situation seems as follows: The gravemen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action), and the rate divisions on coffee exports and commodity imports; nothing in it can

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[15] Plaintiff also argues that when the *Ripley* action was brought in 1949, we had not yet decided *Fanchon & Marco, supra*, 202 F. 2d 731, holding that derivative actions for violations of the antitrust laws would lie, but we do not consider that point to have substance.

fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for the damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedy made clear,[16] as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue. See 8 N. Y. 2d at 446, 209 N.Y.S. 2d at 300. The *Ripley* plaintiffs did not seek a judgment for the loss of the traffic of independents. While they did request judgment in excess of $8,000,000 for unfair divisions on export traffic, the Referee declined to grant any, evidently considering that the proof showed only that IRCA had been forced to reduce its own rates to meet truck competition.

To support its position that the action in the New York courts, which lack power to grant relief under the antitrust laws, could not preclude a later federal treble damage suit, plaintiff relies heavily on Judge L. Hand's well-known holding, in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184 (2 Cir.), cert denied, 350 U. S. 825 (1955), that a state court's overruling of an antitrust defense would not bar a federal suit for treble damages brought by the state court defendant. Defendant distinguishes this, as did the district judge, 254 F. Supp. at 237-38, on the basis that there it was the antitrust defendant, not the antitrust plaintiff, who invoked the state forum. Defendant further asserts that, whatever may be thought of plaintiff's distinction of *Williamson* and the other cases cited above, this cannot explain away our old decision in *Straus* v. *American Publisher's Ass'n*, 201 Fed. 306 (2 Cir. 1912), appeal dismissed, 235 U. S. 716 (1914). Straus had first sued in a New York

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[16] At the instance of counsel for UF, the Referee sustained objections to arguments and evidence which were relevant only to antitrust violations and not to breaches of fiduciary duty.

court under the state and federal antitrust laws for an injunction and damages with respect to an agreement to fix prices of books, and the Court of Appeals had held the agreement valid as to copyrighted although not as to uncopyrighted works. While Straus' appeal to the Supreme Court was pending, he sued in the district court under the federal antitrust act alone. This court held the state judgment conclusive, the opinion saying in one breath that the state court was without jurisdiction of the complaint founded on the federal statute and in the next that the "question was actually involved in the cause before the state court, which was competent to decide it." The Supreme Court later reversed the New York judgment on the merits, 231 U. S. 222 (1913), making a remark equally hard for modern ears to understand: "This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts seeking an injunction and to recover damages under the Sherman Law." 231 U. S. at 237.

The *Straus* case is not directly in point since it held the federal plaintiff barred not by failure to assert a federal claim in the state court but by the state judgment against him upon it. Even as to that, however, Judge L. Hand overruled *Straus* in denying a petition for rehearing in *Lyons, supra,* 222 F. 2d at 195. We think it was well overruled even though, as defendant urges, it perhaps did not need to be in order to support the *Lyons* result.

Since what *Lyons* said in overruling *Straus* would necessarily mean that a judgment in favor of a state court defendant in an action seeking relief under the federal antitrust laws would not bar a subsequent federal suit,[17]

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[17] We do not deal here with a case where the jurisdiction of the state court was challenged and upheld by it, albeit erroneously. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *Alleghany Corp.* v. *Kirby*, 340 F. 2d 311, 312, n. 1 (2 Cir.), cert. granted, 381 U. S. 933 (1965), dismissed, 384 U. S. 28 (1966).

it does seem hard to understand how a plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for antitrust relief can have a larger effect. Compare Restatement, Judgments, § 62, Comment on Clause (a), p. 255.[18] We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from that in which the issue was considered by the district judge. "On the whole, the principle against splitting is a salutary doctrine" but "inflexibly applied there can be little doubt that it results at times in unwarranted hardship." 1B Moore, Federal Practice ¶ 0.410[2] at 1169 (2d ed. 1965). It surely was not incumbent on the stockholders who brought the *Ripley* action in 1949 to recover all damages IRCA might sustain until the end of time from acts of UF of the sort there attacked, even those incurred after the period, through 1960, as to which proof of damages was made. Indeed, if the prior judgment had been in a federal treble damage suit by the corporation, it would not preclude recovery for subsequent antitrust violations. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322 (1955). The complaint should therefore not have been dismissed as to claims within the appropriate period of limitations.

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[18] Section 62k of the Restatement suggests that where the plaintiff sues in a court whose sovereign cannot or has not made available a court which can afford the plaintiff relief for his entire cause of action, there is no bar to a subsequent suit on the unredressed portion of that cause of action in the court of another sovereign which does afford such relief. This seems much closer to the case at bar than the rule of § 62j, relied on by the district judge, 254 F. Supp. at 238, which deals with a prior suit brought in a court of limited jurisdiction where the sovereign has made available another court with jurisdiction to grant all the relief sought.

IV.

Plaintiff's appeal from the denial of its motion for partial summary judgment is without merit. Since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws, the judgment cannot have adjudicated that UF violated them; on this point the overruling of *Straus, supra,* 201 Fed. 306, by *Lyons, supra,* 222 F. 2d 184, works for the defendant. The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that. See Restatement, Judgments, §§ 68 and 71, and *Lyons, supra,* 222 F. 2d at 195-96. With this action limited to damages after February 16, 1961, save on the contract claim which plaintiff does not contend to have been considered in *Ripley,* the role of the findings and judgment in the prior action is even more limited.

The judgment is affirmed insofar as it barred claims for damages under the antitrust laws accruing before February 16, 1961, is reversed insofar as it went beyond this, and is affirmed insofar as it denied plaintiff's motion for partial summary judgment. No costs.

APPENDIX B

Plaintiff's Overwhelming Evidence It Never Had an Opportunity to Offer*

A. Sullivan & Cromwell advised IRCA in July of 1959 that they concluded "it would be better for us to retire as counsel and thus to leave the directors entirely free to select other counsel." Mr. Tennyson sent Mr. McGovern, IRCA's board chairman and general attorney of United Fruit, a *draft* of a reply to Sullivan & Cromwell "requesting that they continue as general counsel to IRCA and in particular to represent us in the appeal from the judgment in the *Ripley* case." But Mr. McGovern changed that draft significantly. He only requested "Sullivan & Cromwell to continue to represent [IRCA] in the appeal from the judgment of the Appellate Division in the *Ripley* case and expressed the hope that the services of Sullivan & Cromwell would be available for other matters "if we have need to call on them." It was clear what Mr. McGovern meant. On July 9, 1959, Mr. Tennyson advised Mr. Haase that "with the exception of matters connected with the *Ripley* case, *Sullivan & Cromwell should not be consulted as counsel and Mr. McGovern thinks you should be governed accordingly.*" In fact Mr. McGovern did not consult the Board on that specific point. The IRCA board minutes show that all legal matters not dealing with *Ripley* were directly controlled by Mr. McGovern.

B. Demand, in effect, was made on an IRCA officer and director and its counsel and *refused.*

1. After the Referee's decision in *Ripley,* several stockholders or their representatives in 1958 demanded that IRCA and Sullivan and Cromwell require United Fruit to

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* (Excerpts from plaintiff's motion for leave to file a petition for rehearing in the Court of Appeals on October 27, 1967, docket pages 1541-1549.)

pay the same rate which is charged its competitors for carrying bananas since this was required by Article VI (A)(9) of the government's antitrust judgment, dated February 4, 1958, against United Fruit.

One stockholder's representative referred to Article VI(A)(9) of said judgment and made the following demand on Mr. Tennyson, Secretary and a *director* of IRCA:

> "Mr. Kritzer stated that U. F. Co., by not paying I.R.C.A. the same car-load rates as were charged other banana shippers, was acting in defiance of the law, and that I, as a Director, should proceed to effect collections accordingly."

Mr. Tennyson sent a copy of his memo and Mr. Kritzer's letter to Mr. Beal, Chairman of the Board and Sullivan & Cromwell, as counsel to IRCA.

That demand was refused.

Plaintiff submits that the demand and refusal indicate that IRCA, after the Referee's decision, was still not willing to sue United for antitrust violations.

C. After the Referee's decision, Sullivan & Cromwell advised IRCA that United had appealed, that plaintiffs-stockholders were expected to appeal on the ground that damages were inadequate and that IRCA should appeal on the same grounds. They advised that prosecution of the appeal to increase money damages should be left to counsel for plaintiffs-stockholders since participation by IRCA's counsel would be duplicative.

On June 30, 1959, after the affirmance by the Appellate Division, Sullivan & Cromwell advised IRCA to support plaintiffs' appeal in the Court of Appeals as the only *reasonable* position for IRCA to take:

> "Since the case is in any event to be reviewed by the Court of Appeals, it seems that the only reasonable

position for IRCA is to appear in that Court to ask an increase in the amount of the judgment and to ask that in all other respects the judgment be affirmed."

In March 1958, Mr. Coolidge, Chairman of the Board of United, discussed with Mr. Bradshaw IRCA's position in the lawsuit at that time "as opposed to its original policy of fighting the claims made on behalf of the minority stockholders."

Mr. Bradshaw's memorandum stated:

> "During our conversation I emphasized the fact that all the Directors of IRCA, *far from being opposed to the United Fruit Company, were very friendly disposed* and always had been, and regretted the difficult and unfortunate situation in which they were placed by the lawsuit. I informed him that we felt very strongly that we had *no option* in this situation but to follow advice of counsel and that if we did not do this we would place ourselves in a very serious situation with our stockholders and *lay ourselves open to attack for personal liability.*"

Accordingly, it is a complete *non sequitur* to say that because IRCA supported plaintiffs-stockholders' appeal in the state courts in *Ripley*, it would have sued United (and exposed themselves to suit) for antitrust violations.

D. After the Referee's decision in *Ripley*, the Chairman of the Board of IRCA and another IRCA director met with both the Chairman of the Board and President of United in October 1958 and discussed with them "the necessity . . . of working out a more satisfactory relationship between the management of IRCA" and United. Certain concrete proposals were made to United which it agreed to consider. Although reminded of it in the interim,

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United had not responded to the proposals by February 1959. IRCA's board chairman then advised the President of United in February 1959, that under such circumstances he and four other directors would not stand for re-election at the Annual Meeting of Stockholders scheduled to be held in June of 1959.

United had not responded to the suggested proposals of IRCA, but instead of fighting United, the five directors took the easy way out and resigned. Those directors who remained were most clearly in United's pocket; they proceeded to elect Mr. McGovern, Chairman of IRCA's Board. United's control thus became more direct than ever. Before this time, United had exercised its domination more indirectly, to wit, through the device of advice offered by Special Advisor Pollan to the IRCA Board, its Chairman and President. In 1959, that control became direct and Mr. McGovern as Chairman of the IRCA Board, dominated it and directed the President and others as to what was to be done. United's domination was thus more open and direct after 1959, and if possible, even more ironclad than before.

The pertinent letter from Mr. Beal, IRCA's Board Chairman to Mr. Redmond, President of United, is dated February 13, 1959 and states:

> "About the middle of last October, as you will recall, Mr. Sutphen and I discussed with you and Mr. Gardner [Chairman of United's Board] the necessity (as we saw it) of working out a more satisfactory relationship between the management of IRCA and your Company. We made concrete suggestions which you then undertook to consider. We have heard nothing from you since that time, although I reminded you of the matter some weeks ago.
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> • • •

Plaintiff's Overwhelming Evidence It Never Had an Opportunity to Offer.

"Under these circumstances, Mr. Sutphen and I have concluded that we will not stand for reelection as Directors of IRCA at the next Annual Meeting of Stockholders, now scheduled to be held on June 3, 1959. Messrs. Chanler, Dixon and Leib have advised us that they will also not stand for reelection at this meeting. We have no present information as to the intentions of the other Directors except that Mr. Bradshaw has resigned as President and as a Director of IRCA effective March 31, 1959, and it has been proposed to elect Mr. Haase as a Director to succeed him."

E. For the stockholders' meeting on June 4, 1958, after the Referee's decision, the IRCA directors presented a slate of eleven directors, which included Oliver R. Grace, a stockholder active on behalf of plaintiffs-stockholders in *Ripley*. On June 2, 1958, United's Board Chairman advised IRCA that it did not intend to vote its stock for the election of directors (at that time 241,100 shares out of 600,000 outstanding shares entitled to vote), "unless something occurs at the meeting that we do not presently anticipate that would make such a course advisable."

United in said letter further advised that it had appealed from the judgment against it and in *"the present posture of that appeal United Fruit Company is averse to exercising its right to vote its IRCA stock unless necessary."*

That United letter was read at the stockholders' meeting. A management slate of eleven, including Oliver Grace, was nominated; an opposition slate of eight directors, also including Oliver Grace, was nominated.

Mr. McGovern announced that United would vote its stock. Nominations were closed.

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Walter B. McGregor was elected over Oliver R. Grace *solely* on the vote of United's block of 241,100 shares. He received no other votes. He was not even nominated. Mr. McGregor was United's nominee, pure and simple.

When the independent slate attempted to take over control, United through McGovern, blocked them by voting United's stock to insure continuing control. This all occurred *after* the Referee's decision.

F. Out of the eleven directors elected at the 1958 stockholders' meeting, one resigned and five others refused to stand for re-election in 1959. Of the *five directors willing to stand for re-election,* four had been directors of IRCA since at least 1949, to wit, Messrs. McGovern, Partridge, Tennyson, and Willer. These men were in United's pocket and *Ripley* so held. Mr. McGregor was United's nominee in 1958. Mr. Haase, the executive Vice President of IRCA, and an employee of IRCA during the period of United's domination since 1930, was elected a director prior to the 1959 annual stockholders' meeting. Mr. Haase was under United's control and domination and was the sixth director on a *nine* man management slate for 1959. (The number of directors had been reduced from eleven to nine.) On March 10, 1959 an article in the Wall Street Journal referred to the resignation of Mr. Bradshaw and the refusal of five other directors to stand for re-election and reported that a United Fruit spokesman said:

> "United Fruit would welcome to the Board of International Railways any substantial stockholders who are really interested in the railroad and *not with lawsuits.*"

Mr. McGovern on behalf of IRCA interviewed stockholders for the purpose of filling the three vacancies on the man-

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agement slate. For this purpose Mr. McGovern approved Messrs. Ruckle, Cunningham and Yaeger. At the 1959 meeting, an independent slate of nine, including Messrs. Ruckle and Cunningham, opposed the management slate.

Had United not voted its stock, the entire independent slate would have won. Only Ruckle and Cunningham, who were on both slates, were elected. United was still not willing to turn over control of the railroad to an independent board.

At the board meeting of IRCA, the next day, Mr. McGovern was elected Chairman of the Board at a salary of $15,000 per year even though he was still the General Attorney for United Fruit Company. Mr. Haase was elected President.

G. Further evidence of United's pervasive domination was that in the period after 1958, at least, the railroad was not making any money on United's bananas shipped from the west coast of Guatemala, and did nothing about it. Despite this, United's banana shipments were so unusually heavy during the spring of 1958 that IRCA was unable to keep the profitable import cargo moving. Moreover, in 1959 IRCA lost considerable coffee and other freight traffic to trucks due to its inability to furnish cars when requested. IRCA preferred United's unprofitable business over profitable business. No independent management would have permitted such a situation to continue.

Mr. Bradshaw recorded the following conversation with Mr. Coolidge, the Chairman of United's Board, on March 26, 1958:

> "Mr. Coolidge asked me whether the Fruit Company's business was important to I.R.C.A. I told him that I considered it of great importance, provided we

received tariff rates on the bananas from the West Coast to Barrios, but that I doubted whether we were now making any money on this business at rates established by the contract between the two companies."

Not to make a profit on the biggest segment of one's business, to wit, United's shipments, and in addition, to turn away profitable traffic to accept United's unprofitable business is a further demonstration of United's iron grip on IRCA in the post-1958 period.

APPENDIX C

Excerpts From United's Brief in United States Court of Appeals (pp. 55-6).

"Appellant attempts to counter this argument by referring (br. 45 and elsewhere) to the findings of 'domination' which were made in *Ripley*. Such a reference misses the point. The 'domination' found in *Ripley* was the kind of domination which the New York courts held was sufficient to impose upon United a fiduciary duty to Railways and its other stockholders. Having established the existence of a fiduciary relationship, the New York courts then went on to declare that the contracts between the parties were unfair to Railways and that their terms should be adjusted accordingly. That kind of domination, which the New York courts held sufficient to establish a fiduciary duty, we submit, is altogether different from the complete control which may be sufficient to toll the running of the statute of limitations. We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the degree of 'domination' found in *Ripley* may have been sufficient to prevent Railways from bringing an action in its own name, as the Appellate Division pointed out in the quotation at appellant's br. 45-6.*

* "It is equally obvious here that demand upon the directors of IRCA to sue UFCo, in connection with the acts and transactions complained of in the instant action, would have been a useless and futile act. (*Sage* v. *Culver*, 147 N. Y. 241, 246; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435, 451.) No fair and honest consideration of such a demand could have been anticipated under the circumstances; nor could there be any

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* Appellate Division quotation from appellant's brief, pp. 45-6.

Excerpts From United's Brief in United States Court of Appeals (pp. 55-6).

reasonable expectation of any just and vigorous prosecution of a suit. The IRCA board was under the influence of UFCo with respect to the causes of action which could be asserted against UFCo . . .

"'Where an antagonistic position is demonstrated, stockholders have the right to remove the matter from the hands of management and bring an action in a representative capacity. (*Chaplin* v. *Selznick,* 186 Misc. 66, 68.) Since futility of demand was shown by the evidence establishing interest or bias on the part of the directors, plaintiffs were entitled to proceed with the action. Surely, we would not compel them to entrust the prosecution of such an action in the hands of persons who would be opposed to the success of the suit.'

"But even that kind of domination did not prevent the *Ripley* stockholders from suing; nor would it have prevented either the *Ripley* stockholders or (after 1959) the independent *Ripley* directors from suing on Railways' behalf on the present claim. Under the *Curtis* doctrine (whatever the fiduciary relationship involved) the statute of limitations accordingly was not tolled."